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12 CASEY CLARKSON,

13 Plaintiff,  
14 v.

15 ALASKA AIRLINES, INC.,  
16 HORIZON AIR INDUSTRIES,  
17 INC. and ALASKA AIRLINES  
18 PENSION/BENEFITS  
19 ADMINISTRATIVE  
20 COMMITTEE,

21 Defendants.

NO. 2:19-CV-005-TOR

PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT

SEPTEMBER 8, 2020  
WITHOUT ORAL ARGUMENT

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## **Declaration of Vincent Cheng (“Cheng Decl.”)**

**Exhibit 1** United States Postal Service electronic proof of delivery for the item bearing tracking number 7016 0910 0000 5356 3765;

**Exhibit 2** Email correspondence sent by Defendants' counsel Tristan Morales to Plaintiff's Counsel R. Joseph Barton dated March 5, 2019.

## **Declaration of Casey Clarkson (“Clarkson Decl.”)**

**Exhibit 1** Letter from Casey Clarkson to Alaska Airlines Pension/Benefit Administrative Committee dated October 22, 2018;

**Exhibit 2** Certified mail receipt for Letter from Casey Clarkson to Alaska Airlines Pension/Benefit Administrative Committee dated October 22, 2018 bearing tracking number 7016 0910 0000 5356 3765;

**Exhibit 3** Letter from Casey Clarkson to Alaska Airlines Pension/Benefit Administrative Committee dated December 27, 2018.

## INTRODUCTION AND REQUESTED RELIEF

This suit alleges violations of the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) against Alaska Airlines, Inc. (“Alaska”) and Horizon Air Industries, Inc. (“Horizon”). Amended Complaint (“Am. Compl.”) ¶ 1 (ECF No. 31). The Amended Complaint alleges two sets of claims on behalf of two classes. First, the Complaint alleges that Alaska and Horizon failed to pay employees when they take short-term military leave, even though they pay employees who take other comparable forms of leave. Second, the Complaint alleges Horizon also failed to properly re-employ employees who take military leave or to provide them with the rights and benefits to which they are entitled. Additionally, Plaintiff also brings an individual claim against the Alaska Airlines Pension/Benefits Administrative Committee for violating the disclosure requirements of the Employee Retirement Income Security Act (“ERISA”). Defendants have asserted nine affirmative defenses in response. *See* Defendants’ Answer at 19-21 (ECF No. 32).

Summary judgment should be granted in Plaintiff’s favor on Defendants’ First, Second, Third, Seventh, Eighth, and Ninth affirmative defenses. The issues raised are straightforward. At least two of these six Affirmative Defenses—statute of limitations and release—fail because Defendants have admitted that they have no evidence to support those defenses. The remaining four defenses—Railway

1 Labor Act (“RLA”) preclusion, laches, lack of personal jurisdiction over class  
2 members, and the takings clause—fail as a matter of law.

3 Summary Judgment should be granted on liability in Plaintiff’s favor as to  
4 Count V as well. There is no genuine issue of material fact that the Alaska Airlines  
5 Pension/Benefit Administrative Committee failed to timely provide Plaintiff with  
6 documents which he requested and was entitled to receive under ERISA §  
7 104(b)(4).

8 **STATEMENT OF FACTS**

9 Casey Clarkson worked for Horizon as a pilot from November 2012 until he  
10 was hired as a pilot for Alaska on November 6, 2017. Declaration of Casey  
11 Clarkson in Support of Plaintiff’s Motion for Class Certification (“Clarkson Class  
12 Decl.”) ¶ 2 (ECF No. 73-22). He is still employed by Alaska. *Id.* From at least  
13 November 2012 until June 30, 2018, Plaintiff was a member of the Washington Air  
14 National Guard. *Id.* ¶ 3. During his employment at Horizon and Alaska, Plaintiff  
15 took leave to perform his military duties. *Id.*

16 While at Horizon, Plaintiff was subject to a virtual credit policy by which he  
17 was credited with only 2.45 credit hours per day for military leave, an amount  
18 lower than his daily average. Mr. Clarkson was required to work or be credited at  
19 least 70 hours in each calendar month to maintain his status as a Regular Line  
20 Holder (a status which carried with it a monthly minimum pay guarantee). Because  
21 the credit he received for military leave was lower than his working average, Mr.

1 Clarkson lost his regular line and was forced into on-call status for July 2017. *Id.* at  
2 ¶ 4.

3 Count I alleges that the virtual credit policy violated USERRA §§ 4312 and  
4 4313 because employees were not reemployed in the position that they would have  
5 held but for military service. Am. Compl. ¶¶ 61-69. Count II alleges that the policy  
6 violated USERRA § 4316(a), which requires that such employees be provided the  
7 seniority and related rights and benefits that they would have attained if they had  
8 remained continuously employed. *Id.* ¶¶ 70-74. Count III alleges that Horizon  
9 violated USERRA § 4316(c) in applying the Policy by discharging employees  
10 from a position following military leave of at least 31 days without cause. *Id.* ¶¶  
11 75-78. Count IV alleges that both Alaska and Horizon violated USERRA §  
12 4316(b) by failing to pay employees when they take short-term military leave, but  
13 paying employees who take comparable forms of non-military leave. *Id.* ¶¶ 37, 41,  
14 79-86.

15 Count V alleges that the Alaska Airlines Pension/Benefit Administrative  
16 Committee failed to furnish Plaintiff with documents to which he was entitled  
17 upon request pursuant to ERISA § 104(b). *Id.* ¶¶ 87-94. Plaintiff is and has been  
18 since at least October 2018 a participant in the Alaska Airlines, Inc. Pilots  
19 Investment and Savings Plan (the “Plan”), the defined-contribution plan offered to  
20 Alaska pilots. Answer to Amended Complaint (“Answer”) ¶ 16 (ECF No. 32). The  
21 Alaska Airlines Pension/Benefit Administrative Committee (the “Committee”) is

1 the Plan Administrator of the Plan. *Id.* On October 22, 2019, Mr. Clarkson sent a  
2 letter via certified mail to the Alaska Airlines Pension/Benefit Administrative  
3 Committee asking it to provide him with:

4 the latest updated summary plan description; (2) any summaries of  
5 material modification to the Plan; (3) the latest full annual report,  
6 including a statement of assets and liabilities of the Plan and  
7 accompanying notes as well as a statement of income and expenses of  
the Plan, and accompanying notes; and (4) any bargaining agreement,  
trust agreement, contract; or (5) other instruments under which the  
Plan is established or operated, and any applicable amendments.

8 Answer ¶ 91; Clarkson Decl. Ex. 1 at 1. The Committee did not respond to Mr.  
9 Clarkson's request. Mr. Clarkson sent a follow-up letter on December 27, 2018,  
10 noting that a response to his request had been due November 21, 2018. Clarkson  
11 Decl. Ex. 3 at 1. The Committee likewise did not respond to this letter. Clarkson  
12 Decl. ¶ 1. The Committee made a partial production of documents on January 8,  
13 2019, the day after this suit was filed, Clarkson Decl. ¶ 4. On February 27, 2019,  
14 Plaintiff's counsel inquired regarding the outstanding documents, including the  
15 latest updated summary plan description for the Plan. Cheng Decl. Ex. 2 at 3. The  
16 Committee produced additional documents on March 5, 2019. Clarkson Decl. ¶ 2.  
17 The Committee has to date not produced the latest updated summary plan  
18 description for the Plan. Cheng. Decl. ¶ 7.

19 **LEGAL STANDARD**

20 Summary judgment is proper where the pleadings, discovery and affidavits  
21 demonstrate that there is "no genuine dispute as to any material fact and the  
movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The  
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1 moving party bears the initial burden to demonstrate the absence of a genuine issue  
2 of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the  
3 moving party has met its burden, the opposing party must show that there is a  
4 genuine issue of fact for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,  
5 475 U.S. 574, 586–87 (1986). The opposing party must present significant and  
6 probative evidence to support its claim or defense. *Intel Corp. v. Hartford Accident*  
7 & *Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). When the nonmoving party  
8 has the burden of proof at trial (as on an affirmative defense), the moving party can  
9 meet its burden on summary judgment by pointing out that there is an absence of  
10 evidence to support the nonmoving party's case. *Devereaux v. Abbey*, 263 F.3d  
11 1070, 1076 (9th Cir. 2001).

## 12 ARGUMENT

### 13 I. Defendants' First Affirmative Defense, that Plaintiff's Claims are 14 Subject to Railway Labor Act Preclusion, Fails as a Matter of Law.

15 Defendants allege that “[p]ursuant to the Railway Labor Act, 45 U.S.C. §§  
16 151, *et seq.* the Court lacks subject-matter jurisdiction to adjudicate the merits of  
17 Plaintiff's claims” because resolution “would require the Court to interpret or  
18 apply a collective bargaining agreement.” Answer at 19. But Defendants identify  
19 no term within any collective bargaining agreement that is subject to dispute. *See*  
20 Defendants' Second Amended Objections and Responses to Plaintiff's First Set of  
21 Interrogatories (“Interrogatory Responses”) at No. 2 (ECF No. 73-10). And the  
Ninth Circuit has held there is no RLA preclusion where the question is whether

1 the “undisputed terms” of benefits provided under a collective bargaining  
2 agreement violate “the independent rights granted to [plaintiff] under USERRA.”  
3 *Huhmann v. Fed. Express Corp.*, 874 F.3d 1102, 1107 (9th Cir. 2017) (finding  
4 USERRA claim not subject to the RLA). Defendants identify no term within any  
5 collective bargaining agreement over which the parties dispute any meaning.  
6 Defendants’ Second Amended Objections and Responses to Plaintiff’s First Set of  
7 Interrogatories (“Interrogatory Responses”) at No. 2 (ECF No. 73-10). To the  
8 extent that employee CBAs will need to be consulted, it will only be for the  
9 purpose of establishing the policies that govern the employment of Plaintiff and the  
10 Class (such as whether military leave is paid or unpaid), not to resolve any dispute  
11 over the rights of Plaintiff or the Class under the CBA. *See Alaska Airlines Inc. v.*  
12 *Schurke*, 898 F.3d 904, 921 (9th Cir. 2018) (holding RLA preemption requires “an  
13 active dispute over ‘the meaning of contract terms’”). Thus, Plaintiff is entitled to  
14 summary judgment on this affirmative defense because this Court is not deprived  
15 of jurisdiction over his claims by operation of the RLA under the controlling rule  
16 of *Huhmann*.

17 **II. Defendants’ Second and Third Affirmative Defenses, Laches and the  
18 Statute of Limitations, Fail as a Matter of Law And Because Defendants  
Have No Evidence to Support those Defenses.**

19 Defendants’ Second Affirmative Defense allege that the claims in the  
20 Complaint are “barred in whole or in part by the doctrine of laches.” Answer at 19.  
21 Defendants’ Third Affirmative Defense alleges that Plaintiff’s claims are barred in

1 whole or in part by the applicable statute of limitations. *Id.* at 19–20. Both  
2 affirmative defenses fail as a matter of law and for lack of evidence.

3       **A. Plaintiff's USERRA Claims (Counts I-IV) Are Not Barred by Any  
4 Statute of Limitations.**

5       Since October 10, 2008, USERRA has provided that for any complaint filed  
6 in “a Federal or State court under this chapter alleging a violation of [USERRA],  
7 *there shall be no limit* on the period for filing the complaint or claim.” 38 U.S.C. §  
8 4327(b) (emphasis added); *see also* Pub. L. 110-389, § 311(f)(1), 122 Stat. 4163  
9 (Oct. 10, 2008). As any claims that accrued prior to this amendment were subject  
10 to a four year statute of limitations, any claims that were timely as of the date of  
11 the amendment remain timely. *See Montoya v. Orange Cty. Sheriff's Dep't*, No.  
12 SACV111922JGBRNBX, 2013 WL 12348371, at \*3 (C.D. Cal. Oct. 23, 2013)  
13 (holding USERRA claims arising after October 10, 2004 not time barred).  
14 Moreover, Defendants have conceded that they do not have “facts supporting the  
15 affirmative defense that the claims are barred by an applicable statute of  
16 limitations.” Interrogatory Responses at No. 4. Thus, Plaintiff is entitled to  
17 summary judgment on Defendants' Third Affirmative Defense.

18       **B. Plaintiff's USERRA Claims (Counts I-IV) Are Not Barred by the  
19 Doctrine of Laches.**

20       The text of USERRA § 4327(b) is not limited to the application of a statute  
21 of limitations, but rather, provides that “*there is no limit on*” the time to file a  
USERRA complaint. 38 U.S.C. § 4327(b) (emphasis added). This applies to the  
defense of laches as much as to the statute of limitations. As the Ninth Circuit has  
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1 explained, “[l]aches is an equitable time limitation on a party's right to bring suit.”  
2 *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002).  
3 To apply a defense of laches to a USERRA claim would allow exactly what §  
4 4327(b) expressly bars: a “limit on the period for filing the complaint or claim.” 38  
5 U.S.C. § 4327(b). Indeed, when Congress similarly amended the law governing  
6 student loan collection actions to provide that “no limitation shall terminate the  
7 period within which suit may be filed,” 20 U.S.C. § 1091a(2), courts uniformly  
8 held that laches was barred by this nearly identical statutory language. *United*  
9 *States v. Lawrence*, 276 F.3d 193, 196 & n.2 (5th Cir. 2001) (holding 20 U.S.C. §  
10 1091a(2) bars equitable defense of laches); *United States v. Baker*, No. 08 Civ.  
11 374, 2009 WL 1407018, at \*3 (E.D. Tenn. May 19, 2009) (holding no genuine  
12 issue of material fact raised on laches defense to student loan collection action  
13 “due to the elimination of the statute of limitations”); *Hamilton v. United States*,  
14 No. 03 Civ. 669, 2005 WL 2671373, at \*4 (S.D. Ohio Oct. 19, 2005) (holding that  
15 to recognize laches defense to student loan collection action would “undermine  
16 Congress’s intent in eliminating the statute of limitations”). Where, as here,  
17 plaintiff “filed suit within the analogous limitations period, the strong presumption  
18 is that laches is inapplicable.” *Reno Air Racing Ass’n., Inc. v. McCord*, 452 F.3d  
19 1126, 1138-1139 (9th Cir. 2006) (quoting *Jarrow Formulas*, 304 F.3d at 835–36);  
20 *Shouse v. Pierce County*, 559 F.2d 1142, 1147 (9th Cir. 1977) (“It is extremely rare  
21 for laches to be effectively invoked when a plaintiff has filed his action before

1 limitations in an analogous action at law has run.”). Thus, Defendants’ affirmative  
2 defense of laches is barred by USERRA § 4327(b) as a matter of law.

3 Finally, as Defendants themselves recognize, “[t]o prove laches, the  
4 defendant must prove both an unreasonable delay by the plaintiff and prejudice to  
5 itself.” Interrogatory Responses at No. 3. Defendants only assert that they have  
6 been prejudiced by any delay because “Plaintiff or other putative class members  
7 now assert that they are entitled to damages for an alleged failure to provide paid  
8 military leave during this extended period of years.” *Id.* But “laches is not a  
9 doctrine concerned solely with timing. Rather, it is primarily concerned with  
10 prejudice.” *In re Beaty*, 306 F.3d 914, 924 (9th Cir. 2002). Defendants must show  
11 either evidentiary prejudice—“such things as lost, stale, or degraded evidence, or  
12 witnesses whose memories have faded or who have died”—or that they “took  
13 actions or suffered consequences that they would not have, had the plaintiff  
14 brought suit promptly.” *Grand Canyon Tr. v. Tucson Elec. Power Co.*, 391 F.3d  
15 979, 988 (9th Cir. 2004). Defendants to do not identify any lost evidence or  
16 witnesses. Interrogatory Responses at No. 3. And “[d]ifficulties caused by the  
17 pendency of a lawsuit, and not by delay in bringing the suit do not constitute  
18 prejudice within the meaning of the laches doctrine.” *Shouse v. Pierce County*, 559  
19 F.2d 1142, 1147 (9th Cir. 1977) (finding no prejudice by delay); *see Grand*  
20 *Canyon Tr.*, 391 F. 3d at 988 (holding that the mere potential for civil fines is not  
21 “the type of expectations-based prejudice that laches requires”). Defendants merely

1 argue that they will *now* have to pay damages (in the amount of paid leave that  
2 they would have otherwise paid), which does not constitute prejudice. *See*  
3 Interrogatory Responses at No. 3.<sup>1</sup> Thus, Plaintiff is entitled to summary judgment  
4 on this affirmative defense.

5 **C. Count V Is Undisputedly Timely.**

6 Count V is brought under ERISA § 502(a)(1)(A), seeking statutory penalties  
7 for failure to furnish certain documents to Mr. Clarkson upon his written request  
8 pursuant to ERISA § 104(b). Am. Compl. ¶¶ 87–94. Mr. Clarkson made a request  
9 for such documents by certified mail on October 22, 2018. Am. Compl. & Answer  
10 ¶ 91; Clarkson Decl. Ex. 1 at 1. The letter was delivered and received on October  
11 25, 2018. Cheng Decl. Ex. 1 at 1. Pursuant to ERISA § 502(c)(1), a response was  
12 due by not later than 30 days later, or November 25, 2018. 29 U.S.C. § 1132(c)(1)

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14<sup>1</sup> From Defendants' Interrogatory Response referencing only "paid military leave,"  
15 it appears that Defendants only assert this defense as to Count IV. *See*  
16 Interrogatory Responses at No. 3. As the Complaint was filed less than 2 years  
17 after Horizon began implemented its Virtual Credit Policy beginning May 1 2017  
18 and Plaintiff raised the issue internally immediately. He filed the complaint less  
19 than 2 years later after Horizon did not remediate the issue after a Department of  
20 Labor finding. Defendants therefore have no argument that they were prejudiced  
21 by a such a small delay. *Atchley v. Pepperidge Farm, Inc.*, No. CV-07-0277-FVS,  
2008 WL 5377770, at \*6 (E.D. Wash. Dec. 22, 2008) (holding plaintiff's mere two  
year delay to file claim "defeats an assertion of unreasonable delay").

1 (response due within 30 days). None came, and Plaintiff's claim therefore accrued  
2 on November 26, 2018. The initial complaint, which included Count V, was filed  
3 less than two months later, on January 7, 2019. See ECF No. 1. This was well  
4 within the limitations period. *See Townsley v. Snc-Lavalin Constructors, Inc.*, No.  
5 C15-1228-JCC, 2016 WL 772792, at \*3 (W.D. Wash. Feb. 29, 2016) (explaining  
6 that while there has been no binding determination as to statute of limitations on  
7 this issue, even the least generous potentially applicable statute limitations in  
8 Washington is two years).<sup>2</sup> These facts are undisputed, and Defendants are aware  
9 of no facts suggesting the statute of limitations for Count V ran prior to the filing  
10 of this case. Interrogatory Responses at No. 4. Plaintiff is entitled to summary  
11 judgment on this affirmative defense to this claim.

12 **III. Defendants' Seventh Affirmative Defense, that the Court lacks Personal  
13 Jurisdiction Over Absent Class Members, Fails as a Matter of Law.**

14 Defendants' Seventh Affirmative Defense asserts that "[t]his Court lacks  
15 personal jurisdiction over class members who have never performed work for  
16 Defendants in Washington." Answer at 20. "It has long been recognized that class

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17 <sup>2</sup> When a federal statute such as ERISA § 502(a)(1)(A) does not provide for a  
18 limitations period, courts look to state law for the most analogous limitations  
19 period. *Townsley*, 2016 WL 772792, at \*3. The most likely candidates are the two-  
20 year "catch-all" provision of Rev. Code Wash. § 4.16.130 or the three-year period  
21 applicable to fiduciary breach claims under Washington law. *Id.* at \*1, \*3.

1 actions may proceed, in fact often must proceed, in the absence of personal  
2 jurisdiction over all class members.” *In re N. Dist. of Cal. Dalkon Shield IUD*  
3 *Prod. Liab. Litig.*, 526 F. Supp. 887, 905 (N.D. Cal. 1981) (citing *Supreme Tribe of*  
4 *Ben-Hur v. Cauble*, 255 U.S. 356, 364 (1921) (holding judgment in class action  
5 brought on behalf of persons who “resided in many different states of the  
6 Union,” binding on all members)). “In accordance with Rule 23’s class action  
7 device, ‘[the] law keys on the representative party, *not all of the class members[]*’  
8 to assess jurisdictional issues.” *McCurley v. Royal Seas Cruises, Inc.*, No. 17-CV-  
9 00986-BAS-AGS, 2019 WL 3006469, at \*7 (S.D. Cal. July 10, 2019) (emphasis in  
10 original) (quoting *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir.  
11 2011)). Defendants do not contend personal jurisdiction is lacking as to *Plaintiff*,  
12 the representative party on whom the focus appropriately lies. *See Answer ¶ 11*  
13 (“Plaintiff and certain other employees of Defendants Alaska and Horizon reside in  
14 and Defendants transact business in the Eastern District of Washington.”). Even if  
15 the Court lacks personal jurisdiction over certain absent members of the putative  
16 classes, that does not prevent issuing a judgment in this case that is binding on  
17 them. Thus, Defendants’ Seventh Affirmative Defense fails as a matter of law.

18 **IV. Defendants’ Eighth Affirmative Defense Fails Because Neither Plaintiff  
19 Nor any Other Class Member has Settled or Released Their Claims.**

20 Defendants’ Eighth Affirmative Defense alleges that “Plaintiff and putative  
21 class members *may be* barred by a settlement or release from bringing claims.”  
Answer at 20 (emphasis added). Plaintiff’s Amended Complaint excludes from the

1 Classes:

2 all former or current individuals who previously reached settlements  
3 with or judgments against Defendants resolving or releasing any  
4 claims arising during the Class Period under USERRA related to any  
5 of the claims in this lawsuit

6 Am. Compl. ¶18. Defendants do not assert that Plaintiff himself has signed any  
7 release or settled his claims, only that they are “investigating” whether he or  
8 members of the Classes have done so. Interrogatory Responses at No. 6. Plaintiff’s  
9 Request for Production No. 6 requested that Defendant produce any documents  
10 that supported any of their affirmative defenses. ECF No. 63-2 at 11. In the ten  
11 months since Plaintiff served that request on September 9, 2019, Defendants have  
12 not produced any purported settlement or release executed by Mr. Clarkson or by  
13 any other member of the Classes that would release the claims in this case. Cheng  
14 Decl. ¶¶ 4-6. As there is no evidence supporting Defendants purported defense  
15 Plaintiff is entitled to summary judgment on Defendants’ Eighth Affirmative  
16 Defense.

17 **V. Defendants’ Obligations to Servicemembers Under USERRA are not a  
18 Government Taking Violative of the Fifth Amendment to the United  
19 States Constitution.**

20 Defendants’ Ninth Affirmative Defense asserts that “Plaintiff’s claims may  
21 be barred by the takings clause of the Fifth Amendment to the United States  
Constitution.” Answer 20-21. According to Defendants’ Interrogatory Response,  
Defendants contend that:

Plaintiff’s theory that employer’s [sic] must pay employees their  
regular salaries while they are on military leave may constitute a

1       “taking” for a public purpose without just compensation in violation  
 2       of the Fifth Amendment to the United States Constitution. *See*  
*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Cf. White v.*  
*Associated Industries of Alabama, Inc.*, 373 So.2d 616 (Ala. 1979).

3       Interrogatory Responses at No. 7. Not only do Defendants misconstrue Plaintiff’s  
 4       Second Amended Complaint,<sup>3</sup> but the Takings Clause does not apply to Plaintiff’s  
 5       claims.

6       The Fifth Amendment’s Takings Clause prohibits the taking of “private  
 7       property ... for public use, without just compensation.” U.S. Const. Amend. V. To  
 8       implicate the Takings Clause, a party must “possess[] a ‘property interest’ that is  
 9       constitutionally protected.” *Sierra Med. Servs. All. v. Kent*, 883 F.3d 1216, 1223  
 10      (9th Cir. 2018). The Supreme Court has held that determining whether a regulation  
 11     amounts to a taking requires analyzing (1) “[t]he economic impact of the  
 12     regulation on the claimant,” (2) “the extent to which the regulation has interfered  
 13     with distinct investment-backed expectations,” and (3) “the character of the  
 14     government action.” *Penn Centr. Transp. Co. v. City of New York*, 438 U.S. 104,  
 15      124, (1978). This framework establishes an insurmountable hurdle for Defendants:  
 16     what is the relevant property interest? What expectations did Alaska and Horizon  
 17     have when they entered the market for the services of Class members that were  
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19       <sup>3</sup> Plaintiff does not allege that employers have a general duty to pay employees  
 20       their regular salaries while they are on military leave. *See* Plaintiff’s Opposition to  
 21       Motion to Dismiss at 22–24 (ECF No. 24).

1 interfered with by the enactment of USERRA? Defendants have no answer to  
2 either question. Interrogatory Responses at No. 7. And in any event, this case  
3 clearly does not fall within either category of *per se* regulatory takings identified  
4 by the Supreme Court. It neither requires a sacrifice of all economically beneficial  
5 uses of Defendants' property, *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003,  
6 1019–20 (1992), nor does it constitute "permanent physical occupation authorized  
7 by government," because members of the Classes continued to work for the  
8 Defendants and were not simply permanently requisitioned by the armed forces.  
9 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 422, 426 (1982).

10 Neither of cases cited by Defendants in their Interrogatory response are on  
11 point. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court  
12 established that a regulation may amount to a taking, but in that case the relevant  
13 property interest was the right to coal—where the government had required the  
14 sacrifice of all economically beneficial uses of the right. *Id.* at 415. This is not such  
15 a case. And *White v. Associated Industries of Alabama, Inc.*, 373 So. 2d 616 (Ala.  
16 1979) was not a case brought under the Takings Clause at all, but rather a case  
17 brought under the due process and impairment-of-contracts provisions of the  
18 Alabama Constitution. *Id.* at 620. Plaintiff is entitled to summary judgment as to  
19 Defendants' Takings Clause defense because no constitutionally protected property  
20 right is implicated by USERRA, and Defendants cannot satisfy the requirements of  
21 *Penn Centr. Transp. Co.* and its progeny.

1 **VI. Plaintiff is Entitled to Summary Judgment as to Liability on Count V.**

2 Count V is brought under ERISA § 502(a)(1)(A), seeking statutory penalties  
3 for failure to furnish certain documents to Mr. Clarkson upon his written request  
4 pursuant to ERISA § 104(b). Am. Compl. ¶¶ 87–94. Pursuant to ERISA § 104(b),  
5 the plan administrator of an employee benefit plan is required, “upon written  
6 request of any participant or beneficiary, [to] furnish a copy of the latest updated  
7 summary plan description, and the latest annual report, any terminal report, the  
8 bargaining agreement, trust agreement, contract, or other instruments under which  
9 the plan is established or operated.” ERISA § 104(b). Defendants admit that the  
10 Committee is the Plan Administrator of the Plan. *Id.* Defendants admit that  
11 Plaintiff is and has been, since at least October 2018, a participant in the Plan.  
12 Answer ¶ 16. Mr. Clarkson made a request for such documents by certified mail on  
13 October 22, 2018. Am. Compl. & Answer ¶ 91;<sup>4</sup> Clarkson Decl. ¶ 2. The letter was  
14 delivered and received on October 25, 2018. Cheng Decl. Ex. 1 at 1. Pursuant to  
15 ERISA § 502(c)(1), a response was due by not later than 30 days later, by  
16 November 25, 2018. 29 U.S.C. § 1132(c)(1) (response due within 30 days of such  
17 request). The Committee did not produce *any* documents until January 8, 2019, the  
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19 <sup>4</sup> Defendants Answer contains a typographical error that states that the request was  
20 made on October 22, 2019. As the Committee’s original Answer, filed on April  
21 17, 2019, contains the same October 22, 2019 date, the 2019 date is obviously a  
typographical error by Defendants. *See* ECF No. 17.

1 day after this suit was filed, and then only partially produced documents—the Plan  
2 document, the most recent annual statement, the CBA for Alaska pilots, and the  
3 Third Amendment to the Plan. Clarkson Decl. ¶ 4. The Committee produced  
4 additional documents on March 5, 2019. Cheng Decl. ¶ 2. However, to date and  
5 despite a specific inquiry by Plaintiff’s counsel, Cheng Decl. Ex. 2 at 2, the  
6 Committee has not produced the most recently updated summary plan description  
7 for the Plan. Cheng Decl. ¶ 7. This is one of the documents specifically referenced  
8 by the statute. ERISA § 104(b). As there is no genuine issue of material fact as to  
9 any of the elements of this ERISA claim and the Committee still has not satisfied  
10 its obligations under ERISA (let alone within the statutory 30 day period), Plaintiff  
11 is entitled to summary judgment as to liability on Count V.

## CONCLUSION

13 For the foregoing reasons, Plaintiff respectfully requests that this Court grant  
14 summary judgment on Defendants' First, Second, Third, Seventh, Eighth, and  
15 Ninth Affirmative Defenses and as to liability on Count V.

1 Dated: July 17, 2020

Respectfully submitted,

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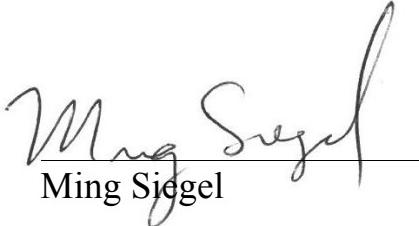
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1                   **CERTIFICATE OF SERVICE**

2                   I certify that on July 17, 2020, I caused the foregoing to be electronically  
3 filed with the Clerk of the Court using the CM/ECF system, which sent notification  
4 of such filing to all counsel of record.

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6                   Ming Siegel  
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